PP

v.

BATA (M) BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[CRIMINAL APPEAL NO: SCA 41-9-95]
11 FEBRUARY 1999

CRIMINAL PROCEDURE: *Prosecution - Conduct of prosecution by government officer - Whether valid - Whether power to prosecute rests solely with Attorney General - Relevance of seizable and non-seizable offences - Employees Provident Fund Act 1951, s. 18(1) - Criminal Procedure Code, s. 380(ii)(b) - Federal Constitution, art. 145(3)*

CONSTITUTIONAL LAW: *Attorney General - Power to institute, conduct or discontinue proceedings - Whether power lies solely with Attorney General - Effect of statutes conferring power on other persons - Whether ultra vires - Employees Provident Fund Act 1951, s. 18(1) - Criminal Procedure Code, s. 380(ii)(b) - Federal Constitution, art. 145(3)*

CONSTITUTIONAL LAW: *Constitution - Interpretation - Attitude adopted by the courts - Federal Constitution, art. 145(3)*

The respondent was charged with an offence under s. 16A(1)(c) of the Employees Provident Fund Act 1951 ('the EPF Act') in the Magistrate's Court, where the matter was prosecuted by an officer of the Employees Provident Fund ('the EPF') under s. 18(1) of the EPF Act read with s. 380(ii)(b) of the Criminal Procedure Code ('the CPC'). The respondent was acquitted and discharged. The prosecution appealed.

The respondent's counsel raised the preliminary objection that the appeal should be struck out as the prosecution in the Magistrate's Court was a nullity since the officer of the EPF had no power to conduct the prosecution.

The main issue before the court was whether the offence under s. 16A(1)(c) of the EPF Act came within the then s. 380(ii)(b) of the CPC, and if so, whether the said s. 380(ii)(b) was void for contravening art. 145(3) of the Federal Constitution, which vests in the Attorney-General the power to conduct criminal proceedings.

Held:

[1] In the interpretation of the Federal Constitution, the approach to be taken is a pragmatic one, construing its provisions broadly, without necessarily being constrained by ordinary rules of statutory intrepretation.

[2] Notwithstanding the prosecution's concession in this appeal that s. 18(1) of the EPF Act was *ultra vires* art. 145(3) of the Federal Constitution, the court was not absolved of the duty to decide the issue as it concerned an issue of public law.

[3] In this case, the offence under s. 16A(1)(c) of the EPF Act was a non-seizable offence, distinct from the offence under consideration in the case of *Repco Holdings Bhd. v. PP* which was a seizable offence.

[4] Section 380(ii)(b) of the CPC allows for any officer of the government to prosecute any summary non-seizable offence in the Magistrate's Court, which is the duty of the said department or authority specially to enforce.

[5] At all material times, the prosecuting officer was an officer of the EPF, and the EPF was the statutory body entitled to prosecute the offence. Moreover, the instituting of the case was in the name of the Public Prosecutor and it could be said that it was the Attorney General by virtue of s. 376(i) of the CPC who instituted the proceeding.

[6] Furthermore, the administration of criminal justice would grind to a halt in the Magistrate's Courts if only the Attorney General as Public Prosecutor and his deputies were allowed to conduct prosecutions of non-seizable offences.

[7] Therefore, the conduct of a prosecution by an EPF officer under s. 18(1) of the EPF Act did not contravene art. 145(3) of the Federal Constitution.

[Preliminary objection overruled.]

Case(s) referred to:

Attorney General of St Christopher, Nevis and Anguilla v. Reynolds [1980] AC 637 ***(refd)***

Attorney General of the Commonwealth ex relatione McKinley v. The Commonwealth of Australia [1975] 35 CLR 1 ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(foll)***

James v. Commonwealth of Australia [1936] AC 578 ***(refd)***
Justin Milroy Naraleera v. PP [1990] 2 CLJ 226 ***(foll)***
Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v. Transport Workers Union [1971] 1 MLJ 102 ***(refd)***
Merdeka University Bhd v. Government of Malaysia [1981] 2 MLJ 356 ***(foll)***
Minister of Home Affairs v. Fisher [1980] AC 319 ***(refd)***
PP v. Datuk Harun Hj Idris [1976] 2 MLJ 116 ***(foll)***
PP v. Lee Ming & Anor [1999] 1 CLJ 379 ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 ***(dist)***
Teh Cheng Poh v. PP [1980] AC 458 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 2, 376(i), 380(i), (ii)(b)
Employees Provident Fund Act 1951, ss. 16A(1)(c), 18(1)
Federal Constitution, arts. 132, 145(3)
Securities Commission Act 1993, ss. 39(2), 40
Securities Industry Act 1983, ss. 86, 91, 126(2)

For the plaintiff - Mohd Hanafiah Zakaria DPP
For the respondent - Asmet Nasruddin; M/s Putucheary, Firoz & Asmet

Reported by Anne Khoo

JUDGMENT

Low Hop Bing J:

Background

On 30 April 1997, the respondent who was charged with an offence under s. 16A(1)(c) of the Employees Provident Act 1951 (EPF Act) was acquitted and discharged by the Magistrate's Court. It was against this order of acquittal and discharge that the prosecution had preferred an appeal. In the Magistrate's Court, the prosecuting officer was one Mr. Bernard Gomez who, at the material time, was an officer of the Employees' Provident Fund.

Preliminary Objection

At the outset of the hearing of this appeal, learned counsel for the respondent raised a preliminary objection on the ground that this appeal should be struck out as the prosecution of the respondent in the court below was a nullity since the officer of the EPF had no power to conduct the prosecution. Learned counsel for the respondent said that under art. 145(3) of the Federal Constitution, only the Public Prosecutor has the power to institute, conduct or discontinue prosecutions. The respondent relied on the judgment of Gopal Sri Ram, JCA, sitting as a judge of the High Court, in *Repco Holdings Bhd v. Public Prosecutor* [1997] 4 CLJ 740.

In the course of perusing the written submissions of learned counsel for the respondent, I invited both the learned counsel and the learned deputy public prosecutor to address me on, *inter alia*, the issue as to whether an offence under s. 16A(1)(c) of the EPF Act is a non-seizable offence which comes within the then s. 380(ii)(b) of the Criminal Procedure Code (CPC), in which case, any officer eg, of any statutory authority may appear and conduct any prosecution of an offence against any written law which it is the duty of the said authority specially to enforce. The argument advanced for the respondent is that s. 380(ii)(b) of the CPC is void as it contravenes art. 145(3) of the Federal Constitution.

Decision Of The Court

Principles Of Constitutional Interpretation

Gopal Sri Ram JCA sitting as a judge of the High Court in *Repco Holdings Bhd v. Public Prosecutor* [1997] 4 CLJ 740 at 750g stated that "our Federal Constitution is a living document written for all time. Its language compresses within it ideas that are manifold and concepts that are multifaceted." His Lordship added that the task of the judicial interpreter of such a document is to give effect to the full breadth of its language. It has always been the consistent view of our courts that in the domain of the interpretation of our Federal Constitution, the approach taken by the court is a pragmatic rather than a dogmatic approach.

Raja Azlan Shah Ag LP (now HRH the Sultan of Perak) in *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 said at p. 33:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – 'with less rigidity and more generosity than other Acts'. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.

Abdoolcader J (later SCJ) in *Merdeka University Bhd v. Government Of Malaysia* [1981] 2 MLJ 356, said at p. 360, "The Privy Council held in *Minister of Home Affairs v. Fisher* [1980] AC 319, 329 that a Constitution should be construed with less rigidity and more generosity than other statutes (also *Attorney General of St Christopher, Nevis and Anguilla v. Reynolds* [1980] AC 637, 655) and *sui generis,* calling for principles of interpretation of its own, suitable to its character, but added that respect

must be paid to the language which has been used, and in *Teh Cheng Poh @ Char Meh v. Public Prosecutor* [1980] AC 458, 468 said that in applying constitutional law the court must look behind the label to the substance. Barwick CJ, said in the High Court of Australia in *Attorney-General of the Commonwealth ex relatione McKinley v. The Commonwealth of Australia* [1975] 35 CLR 1, 17: 'The only true guide and only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.'

It said in *Public Prosecutor v. Datuk Harun bin Haji Idris* [1976] 2 MLJ 116, 120 that the Constitution is not to be construed in any narrow or pedantic sense *(James v. Commonwealth of Australia)* [1936] AC 578, 614) but this does not mean that a court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors.

These principles of constitutional interpretation are applied and adopted in arriving at the decision in relation to the preliminary objection raised by learned counsel for the respondent.

Deputy's Concession

Although the learned deputy public prosecutor has in this case conceded that s. 18(1) of the EPF Act 1951 is *ultra vires* art. 145(3) of the Federal Constitution, nevertheless the matter before me revolves around an issue of public law and so an agreement between the learned deputy and learned counsel or the concession by the learned deputy "does not absolve this court of the duty to investigate the question of its own volition and decide whether the common ground upon which the parties before me stand is indeed maintainable in law. If I come to the conclusion that the impugned subsections are not *ultra vires* art. 145(3), I am at liberty to so declare, despite the agreement arrived at between counsel." (per Gopal Sri Ram, JCA in *Repco Holdings, supra,* at p. 747e). Therefore, notwithstanding the concession made by the learned deputy, I am still duty bound to conduct my own study into this matter and decide on the validity of s. 18(1) of the EPF Act.

Validity Of Section 18(1) Of The EPF Act

I shall now proceed to examine the provisions of s. 18(1) of the EPF Act and to test it against the provisions of art. 145(3) in order to determine whether the former is *ultra vires* the latter.

Article 145(3) of the Federal Constitution reads:

> 145(3) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native or a court-martial..

Article 145(3) has been judicially interpreted by our courts in a number of decisions, the most recent one being in 1997 before Gopal Sri Ram JCA sitting as a judge of the High Court in *Repco Holdings, supra,* at p. 746c. His Lordship held that "from a reading of the plain language of art. 145(3) that supreme law, namely the Federal Constitution, has committed to the hands of the Attorney-General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings." His Lordship further held, at p. 747a, that the only authority that is constitutionally entitled to conduct prosecutions is the Attorney-General as Public Prosecutor. The adjectival vehicle contained in s. 376 and subsequent sections of the Criminal Procedure Code put this beyond doubt.

His Lordship subsequently declared the provisions of s. 126(2) of the Securities Industry Act 1983 (SIA) and s. 39(2) of the Securities Commission Act 1993 (SCA) both of which provided for the conducting of a prosecution by eg, any officer authorised in writing by the Chairman of the Securities Commission, as wholly void and unconstitutional. The provisions of s. 126(2) of the SIA and s. 39(2) of the SCA are reproduced as follows:

> SIA s. 126(2): A prosecution for any offence against any provision of this Act may be conducted by the Registrar or by any officer authorised in writing by the Registrar or by any officer authorised in writing by the Chairman of the Commission.
>
> SCA s. 39(2): Any officer of the Commission authorised in writing by the Chairman may conduct any prosecution of any offence under this Act.

In *Repco Holdings, supra,* his Lordship Gopal Sri Ram JCA at p. 749f held that the expression "conduct" appearing in art. 145(3) and in the aforesaid two impugned subsections carries the same meaning. Since the Constitution exclusively authorises the Attorney General to conduct prosecutions, it must follow, as night follows day, that no other authority may be lawfully empowered to exercise that function.

The decision of his Lordship in declaring s. 126(2) SIA and s. 39(2) SCA void and constitutional was in respect of a prosecution of an offence against s. 86 of the SIA and punishable under s. 91 thereof. Section 91 of the SIA provides for the punishment on conviction ie, a fine not less than RM1,000,000 and an imprisonment term not exceeding ten years.

The provisions of s. 91 of the SIA under consideration by his Lordship in *Repco Holdings, supra* come within the definition of a seizable offence. His Lordship further held that s. 380(i) of the Criminal Procedure Code which permits a public officer to prosecute in any court in any case or class of cases in which he is by any written law authorised to prosecute in such court provides no assistance to the Securities Commission because while, for the purposes of carrying out their duties, members and servants of the Securities Commission are deemed to be public servants under s. 40 of the SCA, they do not fall within the scope of s. 380(i) of the Code. If the members and servants of the Securities Commission were members of the Public Service as defined in art. 132 of the Federal Constitution, the position may well have been different as they would have fallen within the scope of s. 380(i) of the Code and so would have the power to prosecute in any court in any case or class of cases in which a public officer is by any written law authorised to prosecute in such court.

His Lordship in *Repco Holdings, supra,* further held that under s. 126(2) of the SIA, and for that matter under s. 39(2) SCA, the chairman of the Securities Commission is not placed in the same position as the Registrar of Companies because the registrar is as a matter of practice a senior member of the judicial and legal service and is normally a gazetted deputy public prosecutor and could therefore authorise or conduct prosecutions under the SIA. The chairman of the Securities Commission could not lawfully ie, constitutionally authorise or conduct prosecutions under the SIA. It is to be noted that the offences under the SIA are seizable offences under Criminal Procedure Code, whereas an offence under s. 16A(1)(c) of the EPF Act, in the instant case, is a non-seizeable offence.

Section 18(1) of the EPF Act provides as follows:

> Prosecutions in respect of any offence against the provisions of this Act or of any regulations or rules made thereunder may be conducted by any officer in writing in that behalf by the Chairman of the Board.

The provisions of s. 18(1) of the EPF Act must be read conjunctively with art. 145(3) of the Federal Constitution and s. 376 and the then s. 380 of the Criminal Procedure Code. Both s. 376 and the then s. 380 of the Criminal Procedure Code are reproduced below:

> 376(i) The Attorney-General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.
>
> (ii) The Solicitor-General shall have all powers of a Deputy Public Prosecutor and shall act as Public Prosecutor in case of the absence or inability to act of the Attorney-General.

(iii) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally.

(iv) The rights and powers vested in or exercisable by the Public Prosecutor by sub-s. (iii) and s. 68(ii) shall be exercisable by the Public Prosecutor personally.

380. Notwithstanding anything in this Chapter contained:

(i) any public officer may prosecute in any Court in any case or class of cases in which he is by any written law authorised to prosecute in such Court;

(ii) in summary non-seizable cases in the Court of a Magistrate:

(a) the Public Prosecutor or a Deputy Public Prosecutor or a Police Officer may appear and conduct any prosecution;

(b) any officer of any Government or of any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce;

(c) any private person may appear in person or by advocate or, in the State of Trengganu, by a pleader and prosecutor for an offence against his own person or property.

The then s. 380 was valid until it was amended by Act A1015 with effect from 1 April 1998. Since the respondent was charged in the Magistrate's Court on 30 April 1997, it is my view that the then s. 380(ii)(b) was applicable and is not affected by the amendments pursuant to Act A1015.

It is to be noted than an offence under s. 16A(1)(c) of the EPF Act 1951 is a non seizable offence as it stipulates a maximum fine of RM10,000 or a maximum imprisonment for a term not exceeding twelve months. By s. 2 of the Criminal Procedure Code, a non-seizable offence is one which a police officer may not ordinarily arrest without warrant according to the third column of the First Schedule. The First Schedule under the heading "Offences Against Laws Other Than The Penal Code" provides that for offences with imprisonment for less than three years, summons shall ordinarily be issued in the first instance and that there shall be no arrest without warrant.

Hence, the question that follows immediately for determination would therefore be:

> Does the conduct of a prosecution by an EPF officer under section 16A(1)(c) of the EPF Act contravene article 145(3) of the Federal Constitution, read together in particular with the then s. 380(ii)(b) of the Criminal Procedure Code?

In my considered opinion, the conduct of a prosecution by an EPF officer under s.18(1) of the EPF Act here does not contravene art. 145(3) of the Federal Constitution, since the prosecuting officer is at all material time an officer of the EPF which is a statutory authority ie, an authority established under a statute ie, the EPF Act (see also *Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v. Transport Workers Union* [1971] 1 MLJ 102, 105). The EPF Act is also the written law which it is the duty of the EPF specially to enforce and so an officer of the EPF acting in strict compliance with the provisions of s. 18(1) of the EPF Act as in the instant case was entitled to prosecute an offence under the EPF Act. Such prosecution is permissible under the then s. 380(ii)(b) Criminal Procedure Code. Morever, the instituting of this case was in the name of the Public Prosecutor and it can be said that it was the Attorney General, by virtue of s. 376(i) of the Criminal Procedure Code, who instituted this proceeding against the respondent. In *Justin Milroy Naraleera v. Pendakwa Raya* [1990] 2 CLJ 226, 229, it was held by Mahadev Shankar, J (later JCA) that all prosecutions under the Criminal Procedure Code are under the control and direction of the Public Prosecutor. It is therefore in his name that criminal proceedings must be initiated. In my view, it would be most unthinkable, and the administration of criminal justice by way of prosecutions of non-seizable offences in our magistrate's courts would certainly grind to a halt, if the Attorney-General as Public Prosecutor or any of his deputies and no one else is permitted to conduct such a prosecution in respect of a non-seizable offence under the procedure contained in the then s. 380(ii)(b) of the Criminal Procedure Code.

In *PP v. Lee Ming & Anor* [1999] 1 CLJ 379 at p. 385, Ian Chin, J observed, *inter alia,* as follows:

> Any provision which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence must necessarily fall foul of art. 145(3). In this regard s. 380(ii)(b) which the prosecution relies on as allowing the prosecution officer to prosecute must be examined to see whether it falls foul of art. 145(3). It is clear from the wording of s. 380(ii)(b), which I have earlier reproduced, that the conduct of prosecution was taken totally out of the hands of the Federal Attorney General and vested in officers of Government department, local

authority or statutory authority and there is not even a need to obtain sanction to prosecute from the Attorney General. It must follow from the decision of *Repco Holdings Bhd v. Public Prosecutor* that s. 380(ii)(b) is also unconstitutional and a nullity. Not only that, every legislation, be it State or Federal, which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence would also be unconstitutional and a nullity.

Be that as it may, his Lordship in the later part of his judgment noted that the word "sole" or "only" is missing in art. 145(3) and opined that it "is demonstrative of the clear intention of the framers of the Constitution that the Federal Attorney General should not be the sole or only person to institute, conduct or discontinue any proceedings for an offence, especially very minor offences like those dealing with stray or unlicensed dogs, littering, illegal hawking, handling food without a health licence, registration of buffaloes, registration of bicycles and so on. The more serious offences are those under the various ordinances and enactments, like felling timber from a forest. The decision whether to institute proceedings in respect of those offences has throughout the years been very properly and wisely left to the various local authorities and the officers of the State Attorney-General's Chambers. They have been entrusted by the legislators to perform their duties by the enactment of Ordinances or Bye-Laws and, in my view, that intention of the legislators was made clear by the omission of the word "only" or "sole" from the said Article.

His Lordship's observation above would in my humble opinion be in line with the construction which I have given to the provisions of the then s. 380(ii)(b) which was in force until 30 March 1998.

On the foregoing grounds, I hold that the provisions of s. 18(1) of the EPF Act do not offend art. 145(3), but indeed are consistent and in harmony with art. 145(3), read conjunctively with s. 376 and s. 380(ii)(b) of the Criminal Procedure Code and is therefore valid and of full legal effect. In the circumstances, the answer to the question which was formulated above for determination by the court is in the negative and so a prosecution by an EPF officer under s. 16A(1)(c) of the EPF Act does not contravene art. 145(3) of the Federal Constitution read in particular with the then s. 380(ii)(b) of the Criminal Procedure Code.